IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 94 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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DINESH DHIMETRAY MEHTA

Versus

STATE OF GUJARAT

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Appearance:
MR BS SUPEHIA for Appellant
THROUGH JAIL for Appellant
MR KP RAVAL, Ld. APP for Respondent - State

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CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 27/09/2002

C.A.V. JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

[1] The original accused of N.D.P.S. Case No.3 of 1998, which came to be decided and disposed by the learned Special Judge, Vadodara of the Special Court constituted under Section 36-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 has, by filing this appeal under Section 374(2) of the Criminal Procedure Code, 1973 [For short "Cr.P.C.] read with Section 36-B of the N.D.P.S. Act, 1985 [for short "N.D.P.S. Act"] challenged the correctness and legality of the judgment Ex.48 dated 30/12/2000 of conviction and sentence rendered by the said learned Special Judge, Vadodara in aforesaid case namely N.D.P.S. Case No.3 of 1998, whereby the present appellant has been convicted under Section 235(2) of the Cr.P.C. for an offence punishable under Section 20(b)(i) of the N.D.P.S. Act and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/-[Rupees One Lacs Only] and in default to undergo further simple imprisonment for one year.

[2] As per the complaint Ex.27 lodged by Shri D. S. Deol, Police Inspector, J.P.Road Police Station, Vadodara City, the case of prosecution in a nutshell is as follows:-

[2.1] On or about 05/01/1998, the complainant Shri D. S. Deol, Police Inspector was present on duty in J.P. Road Police Station, Vadodara. P.W. 8, Shri Samsersinh Miyasinh, who was Deputy Police Commissioner, Southern Region, Vadodara City informed the complainant - Shri D. S. Deol, by giving a telephone message to the effect that one Dinesh Dhimantrai Mehta [present appellant] is illegally keeping "Charas" in his possession in his residential house No.C/23, situated in Sumant Park, Vadodara and that he is selling that "charas" and further that at present, that Dinesh Dhimantrai Mehta had kept illegally "charas" in quantity in his house. By that message, Shri Samsersinh Miyasinh also directed Shri Deol to go to that place of residence of Shri Dinesh Dhimantrai Mehta and make a raid and search his house. Thereupon, Shri Deol sent Police Head Constable Shri Dineshbhai Bhikhabhai B.No.2184 to call two persons to act as panch witnesses. The Police Head Constable Shri Dineshbhai Bhikhabhai called two persons namely [1] Ilyas Ismailbhai Patel and [2] Nirmalkumar Shantilal Shah. They appeared before Shri Deol in Police Station, Vadodara. Shri Deol apprised of said two panch witnesses and other Police personnel, who were to accompany Shri Deol for raid and search pursuant to the information, which he received from Shri Samsersinh Miyasinh. Shri Deol allowed said two panch witnesses and members of raiding party to take search of each other to ascertain

that no one had with him any contraband article. Thereafter, Shri Deol in company of the said two witnesses and members of his raiding party, by taking with him necessary articles for packing and sealing left Police Station for residence of the present appellant. Before leaving Police Station, Shri Deol made an Entry No.20/98 at about 14.05 hours in Station diary. He also drew a preliminary panchnama during the period from 13.45 to 14.00 hours, on 05/01/1998.

[2.2] Shri Deol, two panch witnesses, P.S.I. Shri P.H. Bhesania and four other staff - members of the Police, by travelling in Government vehicle, left Police Station for residence of the appellant. The other members of the raiding party also started to go with Shri Deol, by travelling in another private vehicle. They reached at Flat No.C/23 of Sumant Park Apartment, Vadodara at about 14.15 hours.

[2.3] The door of that Flat No.C/23 was knocked by Shri Deol. One person opened the door of that Flat. Shri Deol told that person to come out from the Flat. Shri Deol asked the name and address of that person. The person informed Shri Deol that his name was Dinesh Dhimantrai Mehta resident of C/23, Sumant Park Apartment, Opp. Shrenik Park, Near Akota Stadium, Vadodara. He has also informed Shri Deol that originally, he was of Jamnagar, residing at Suvidhisadan, Near Pancheshwar Tower, at Jamnagar. The complainant gave his identification to the appellant and informed him that charas in quantity was there, in his house and for that, he wanted to raid and search his house. Shri Deol gave oral as well as written information/explanation to the appellant as to whether he wanted his house to be searched in presence of the Magistrate or a Gazetted Officer or Superior Police Officer. The appellant informed Shri Deol that he wanted his house to be searched in presence of some Superior Police Officer. On being informed thus by the appellant, Shri Deol informed Shri Samsersinh Miyasinh on telephone. Within short period, Shri Samsersinh Miyasinh came to the residence of appellant. Before making raid and search, Shri Deol allowed the panch witnesses and members of the raiding party to make interse search of each other to ascertain that they had no contraband articles with them. Thereafter, Shri Deol by keeping the appellant present with him started to raid and search the house of the appellant, in the presence of the panch witnesses, Shri Samsersinh Miyasinh, [Deputy Police Commissioner, South]. On making raid and search the Flat No.C/23, it was found that in the beginning, first there was a drawing room and

on western side of that drawing room, there was one bad room. There was one shelf [Nourth-South] on eastern side wall of that bad room. Some house hold articles were there on that shelf. Among that house hold articles on shelf, there was one black coloured rexine bag. There were two cardboard boxes in that rexine bag. Out of two boxes, one was having a design on the outer cover of that box, while other was yellow-red coloured box. On each of the boxes, sticker was affixed on it with a write up viz 'Manufacturer and Seller Kandoi Trikam Bechar Mesubwala, Mesubwala Building, Bardhan chowk, Jamnagar-1." That two boxes were opened in presence of panch witnesses and on opening that boxes, it was found that there were black coloured small and big pieces in rectangular shape, in said boxes and that pieces were covered under plastic. That pieces were smelt by panch witnesses and Shri Deol and members of the raiding party. It was found that pieces were of charas. As per the case of the prosecution, during the raid and search, two bottles containing English wine, were found from the house of the appellant. There was a Green Label of "Rich Blend Whisky International Distillery India, 750 ML." on each bottle. As per the case of the prosecution that two bottles were estimated to be of value of Rs.500/-. In that very room, there was one electric switch-board in the southern corner of East-West Wall and on opening that switch-board, it was found that there were two packets in plastic bag inside the hollow portion of switch-board and from that two packets black coloured pieces in rectangular shape were found and on smelling that pieces it was found that the pieces where of charas. Thereafter, kitchen was raided and searched. On opening electric switch-board on the southern side of wall of that kitchen, two packets in one plastic bag were found from the hollow portion of that switch-board. On opening that two packets, similar black coloured pieces in rectangular shape were found. That pieces were smelt and it was found that the pieces were of charas. Thereafter, Shri Deol asked the appellant as to whether he had any pass or permit or licence or authorization letter for keeping that charas as well as English Wine. The appellant informed Shri Deol that he had no such pass, permit or authority letter. Thereafter, one Police constable Jalaluddin Badruddin was sent to call one shopkeeper along with scale and measurement weights, within short period. Jalaluddin Badruddin brought one shop keeper namely Pradip Bhagwandas Soni together with a scale and measurement weights in range of weights from 10 Grams to 1 Kg. Thereafter, Shri Deol got that pieces of charas weighed with the help of Pradipbhai Bhagwandas Soni, who had come there with scale and measurement

weights. It was found that that article was weighing 4 Kg. and 940 Gram. Shri Deol estimated value of that charas to be of Rs.1,95,000/- [Rupees One Lac Ninety Five Thousand Only]. Thereafter, that pieces of charas were placed inside one plastic bag and that plastic bag was placed in one cloth bag and it was stitched with the help of needle and string. Thereafter, a slip bearing signatures of panch witnesses, Shri Deol and Shri Samsersinh Miyasinh, was affixed on that stitched cotton bag. Thereafter, that cotton bag was sealed with sealing wax with seal of "Police Inspector, J.P.Road Police Station, Vadodara." Along with that contraband articles, one passport in the name of appellant, one passbook of State Bank of India in the name of the appellant, black coloured rexine bag and two card board boxes meant for sweets, were seized under panchnama in presence of panch witnesses. That second panchnama was drawn during the period from 15.00 hours to 17.00 hours. Shri Deol obtained one receipt from Pradipbhai Bhagwandas Soni, who had weighed charas. That certificate was signed by the panch witnesses and Shri Deol. The accused was arrested for the offence punishable under the provisions of NDPS Act at 17.00 hours. One writing was prepared stating the grounds of arrest in duplicate. The original writing was given to the appellant and the office copy signed by the appellant was kept by Shri Deol, P.S.I. Shri Bhesania seized two bottles of English Wine under the provisions of the Bombay Prohibition Act, for which a separate case has been lodged against the appellant.

[2.4] Shri Deol along with seized articles and appellant went to J.P.Road Police Station, Vadodara and lodged his complaint against the appellant at 18.30 hours on 05/01/1998. Shri Deol entrusted the custody of the appellant to P.S.O. of the said Police Station. He also handed over the articles seized from the house of the appellant to same P.S.O. The complaint lodged by Shri Deol came to be registered as C.R.No.II-10/98. That offence registered on the basis of complaint was investigated by Shri Deol by himself and on completion of investigation, Shri Deol filed a charge-sheet against the appellant in the Court of the learned Special Judge, Vadodara on 24/03/1998. That charge-sheet came to be registered as N.D.P.S. Case No.3 of 1998.

[2.5] Mr.R.M.Parmar, the then learned Special Judge, Vadodara framed charge Ex.5 against the accused on 11/07/1998. On plea of the appellant, being recorded he pleaded not guilty to the charge and he claimed to be tried. He also stated to the Court that he himself would

defend the case, personally. Thereafter, the prosecution examined in all nine witnesses to prove the case against the appellant. The prosecution also produced the documentary evidence in support of the case against the appellant. The accused/appellant examined one defence witness D.W.1 Murlidharan Vishvanathan Nair at Ex.37, in his defence. After hearing the arguments of learned APP for the State and appellant-in-person, Mr.R.M.Parmar, the then Special Judge, Vadodara rendered his judgment Ex.38 on 19/09/1998 by which the present appellant was convicted for an offence punishable under Section 20(b)(ii) of the NDPS Act and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/-- and in default of fine to undergo further R.I. for one year.

[3] Being aggrieved against and dissatisfied with the said judgment dated 19/09/1998, the appellant preferred Criminal Appeal No.921 of 1998 to this Court. That Criminal Appeal No.921 of 1998 was heard and decided by this Court [Coram : J.N.Bhatt and J.R.Vora, JJ.] and by its order dated 31/07/2000, the impugned judgment dated 19/09/1998 rendered by Mr.R.M.Parmar, the then Special Judge, Vadodara was set aside and quashed, with a direction that said case be sent back to the Trial Court for "de dovo" trial, after observing the requisite procedure for providing Legal Aid to the accused, in his defence, as expeditiously as possible and preferably within a period of four months from the date of receipt of file from this Court, since the accused was in Jail.

[4] The learned Special Judge received writ of this Court Ex.40 on 14/08/2000. By an order Ex.41 dated 25/08/2000, the Secretary of the District Legal Services Authority, Vadodara appointed one Advocate Shri M.H. Shaikh to defend the present appellant in the trial Court. The learned advocate Mr.M.H.Shaikh submitted an application Ex.42 to the learned Special Judge, Vadodara requesting to start the trial "de-novo". The learned Judge passed an appropriate order on 28/11/2000 below application Ex.42. From the record, it appears that the learned Additional Public Prosecutor for the prosecution submitted a purshis Ex.44 stating interalia that the oral evidence of nine witnesses has been recorded and the State placed reliance on oral evidence of that nine witnesses given in examination-in-chief and whatever documents have been produced during the trial through the said nine witnesses, were to be treated as documentary evidence for the prosecution and the prosecution does not want to produce any further documentary evidence. From the record, it appears that thereafter, learned Advocate Mr.M.H.Shaikh cross-examined all the nine witnesses, who

were examined earlier by the prosecution in detail at length. Thereafter, the prosecution declared their evidence to be closed. The accused/appellant submitted a purshis Ex.47 stating interalia that he does not want to examine any witness in his defence. From the record, it appears that thereafter, the learned Special Judge, Vadodara heard the arguments of learned Additional Public Prosecutor for the State and Mr.M.H.Shaikh, learned advocate for the appellant-accused and, thereafter by rendering the judgment dated 30/12/2000, Shri C.D.Patel, learned Special Judge, Vadodara convicted and sentenced the appellant as stated in para-1 hereinabove. As against this second judgment of conviction and sentence, after holding "de novo" trial by the learned Special Judge, Vadodara, the original accused has preferred this present Criminal Appeal.

[5] We have heard Mr.B.S.Supehia, learned advocate for the appellant and Mr.K.P.Raval, learned APP for the respondent State in detail, at length. Mr.B.S.Supehia has taken us through the oral evidence as well as documentary evidence and the impugned judgment challenged in this appeal.

[6] We have anxiously considered the submissions made by both the parties. We have carefully examined and reappreciated the evidence on record. For the sake of convenience, it is necessary to note as to what evidence has been led by the prosecution before the trial Court.

[A] ORAL EVIDENCE :-

[1] P.W.1, Ilyas Ismail Patel [panch witness] Ex.8;
[2] P.W.2, Pradipbhai Bhagwandas Soni [Goldsmith, who weighed the articles] Ex.15;
[3] P.W.3, P.S.I., Pareshbhai Bhagwandas Bhesania Ex.17;
[4] P.W.4, Police Jamadar Fatesing Bhavansingh Ex.20;
[5] P.W.5, Police Constable Maheshbhai Chhaganbhai Ex.21;
[6] P.W.6, Police Jamadar Adesinh Himmatsinh Ex.23;
[7] P.W.7, Police Inspector, Devising Shivlalsing Deol [complainant], Ex.26;
[8] P.W.8, D.C.P. Samsersinh Miyasinh Ex.30;
[9] P.W.9, Bipin Durlabhji, Scientific Officer of F.S.L. Ex.31;

[B] DOCUMENTARY EVIDENCE :-

[1] Panchnama Ex.9;
[2] A written information given to the appellant for

compliance of Section 50 of the N.D.P.S. Act Ex.13;

[3] A writing stating interalia the grounds of arrest of the appellant Ex.14;

[4] A certificate issued by P.W.2 Pradipbhai Bhagwandas for he having weighed the seized articles Ex.16;

[5] A letter of receipt of muddamal articles issued by responsible Officer of F.S.L. Ex.22;

[6] A copy of Entry No.20 from the Station Diary of J.P.Road Police Station, Vadodara, Ex.24;

[7] A copy of Entry No.21 from the Station Diary or J.P.Road Police Station, Vadodara, Ex.25;

[8] A complaint lodged by Shri Deol Ex.27;

[9] A copy of forwarding letter sent by Investigating officer to F.S.L. Ex.28;

[10] Yadi given by Shri Deol to Police Constable Maheshbhai Chhaganbhai directing him to carry with him and hand over the muddamal articles to the F.S.L. Ex.29;

[11] A report of F.S.L. Ex.32;

[12] A report from Biological Division of F.S.L. Ex.33;

[13] A letter acknowledging the receipt of parcel addressed by Assistant Director of F.S.L. to Police Inspector, J.P. Road Police Station, Vadodara Ex.34;

[7] Mr.B.S.Supehia, learned advocate for the appellant has argued that the officer P.W.8 - Shri Samsersinh Miyasinh, who received an information from the informant has committed a breach of Section 41(2) of the NDPS Act, by not reducing that information which he received into writing. He has further argued that P.W.8 Shri Samsersinh Miyasinh, while giving direction to P.W.7 Shri Deol to go to the place stated in the information to raid and search the house of the appellant, gave that information to P.W.7 Shri Deol on phone and Shri Deol reduced that information into writing, by making an Entry No.20/98 [Ex.24] in the Station Diary. He has argued that Shri Deol has committed a breach of Section 42(2) of the NDPS Act, by not sending a copy of that information forthwith to his immediate Superior Officer. He has argued that the provisions of Sections 41 and 42 of the NDPS Act are mandatory provisions and the breach thereof vitiates the trial against the accused and, therefore, the accused be acquitted of the offence, by allowing this appeal. He has further argued that in this case, P.W.7 Shri Deol, who received an information from P.W.8 Shri Samsersinh Miyasinh and made and Entry No.20/98 in the Station Diary, by keeping panch witnesses at the time of

raid and search, raided and searched the house of the appellant, lodged the complaint against the appellant, investigated the case against the accused and ultimately, he filed the charge-sheet against the accused in the Court and, therefore, he is an officer who received information, the complainant, raiding officer, I.O., and officer filing the charge sheet. Under these circumstances, his evidence has become gravely suspicious and it requires to be scrutinized more care and caution. By not making a full report of particulars of arrest and seizure to his immediate Superior Officer, within 48 hours, the trial has been vitiated, as a result of noncompliance of Section 57 of the NDPS Act. He has further submitted that looking to the conduct of Shri Samsersinh Miyasinh grave suspicion has been created and on making close scrutiny of evidence of Shri Samsersinh Miyasinh, one can safely say that for some ulterior motive Shri Samsersinh Miyasinh has taken undue interest in the case, which clearly makes the case doubtful and, therefore, this is a fit case in which the benefit of doubt should be given to the appellant, by allowing this appeal.

[8] Mr.K.P.Raval, learned APP for the respondent - State has supported the judgment of conviction and sentence rendered by the learned Special Judge, Vadodara. He has practically adopted the arguments accepted by the learned Special Judge, while rendering the impugned judgment. He has further argued that Shri Samsersinh Miyasinh has not committed a breach of Section 41(2) of the Act and further that Shri Deol, who raided and searched the house of the appellant has not committed a breach of Section 42(2) of the Act. He has further argued that when Section 57 of the N.D.P.S. Act is not a mandatory provision, the appellant should satisfy the Court that he has been prejudiced in his defence when Shri Deol has failed to comply with the provisions of Section 57 of the NDPS Act. In short, Mr.K.P.Raval, learned APP for the respondent - State has supported the judgment of conviction and sentence, which is challenged in this appeal.

[9] During the course of hearing of this appeal, this Court passed the following order on 16/08/2002.

"[1] xxxxx
[2] xxxxx
[3] During the course of hearing, while taking us through the paper book

consisting of oral as well as documentary evidence, it transpires that the important documents i.e. Exs.24 and 25 the Station Diary maintained by concerned Police Officer of J.P. Road Police Station, Baroda and the entry from the said Station Diary of J.P.Road Police Station, Baroda are not legible. Accordingly we inform Mr.K.P.Raval, learned APP to get original Station Diary from J.P. Road Police Station, Baroda with the prepared legible copies in five sets. Mr.Raval has requested that the matter be kept on 27th August, 2002 by treating this matter as "Part Heard".

[4] Without referring the original Station Diary, it is not possible for this Court to proceed further in the matter and, therefore, the matter is accordingly treated as Part Heard. As the present Sittings are changed from 19th august, 2002, the Office is directed to obtain necessary orders from the Hon'ble Chief Justice in this regard."

[9.1] Accordingly, Mr.K.P.Raval produced loose sheets of pages 21 to 27 from original Station diary, on 27/08/2000. We have carefully perused that original Station diary, which contains Entry Nos.1 to 29 of 05/01/1998. Mr.K.P.Raval, learned APP, has also produced typed copies of relevant Entry Nos.18 to 29, which are kept with the paperbook. Mr.Supehia has produced certain authorities with regard to the compliance of Sections 41 and 42 of the N.D.P.S. Act. We will deal with that authorities at appropriate stage. We have also perused a detailed appeal memo forwarded by the appellant through Jail Authority as present appeal is filed by convict through Jail. We have considered the grounds taken by the appellant in the said appeal memo.

[10] From the evidence on record, it is very much clear that the prosecution has come with a specific case that P.W.8 - Shri Samsersinh Miyasinh, Deputy Commissioner of Police, Southern region, at Vadodara was present on his duty in his office. At about 1.00 p.m., one informant gave a secret information to said Shri Samsersinh Miyasinh to the effect that one Dinesh Dhimantrai Mehta [appellant] residing in Block No.C/23 of Sumant Park Apartment, situated in Akota area of Vadodara

had certain quantity of charas with him. On receipt of such information, P.W.8 - Shri Samsersinh Miyasinh made a telephone to complainant - P.W.7 Police Inspector Shri Deol who was performing his duty in J.P. Road Police Station, Vadodara.

[11] As per evidence of P.W.6 - Police Jamadar Adesinh Himmatsinh Ex.23, he was on duty as P.S.O. of J.P.Road Police Station, Vadodara during the period from 12.00 hours to 20.00 hours on 05/01/1998. As per his evidence, Shri Deol received that telephone "Vardhi" at 14.05 hours. P.W.6 - Police Jamadar Adesinh Himmatsinh has deposed that in said "Vardhi" it was informed to the effect that Dinesh Dhimantrai Mehta residing at Flat No.C/23 in Sumant Part Apartment, Vadodara was preparing and keeping quantity of charas in his house. As per evidence of P.W.6 - Police Jamadar Adesinh Himmatsinh, Police Inspector Shri Deol personally made an Entry No.20 in the Station Diary of the Year 1998. That entry is at Ex.24. We have perused that original Entry No.20 [Ex.24] from the original Station Diary, which we had called for. That Entry No.20 [Ex.24] is on page-24 of the Station Diary. It was made at 14.05 hours. From the cross-examination of P.W.6 - Police Jamadar Adesinh Himmatsinh, it appears that it is also the case of the prosecution that it was a routine practice of the Police Station that an entry with regard to the "Vardhi" received on telephone is made in "Vardhi"-Register. As he was incharge of P.S.O., Shri Deol had called for that "Vardhi" book from him. Before Shri Deol left the Police Station, Shri Adesinh Himmatsinh received back the said "Vardhi" book from Shri Deol. He has further deposed that when he received back said "Vardhi" book from Shri Deol, he found that in "Vardhi" Book Shri Deol had made a note of information, which he had received on telephone from Deputy commissioner of Police, South. He has further deposed that he had informed Investigating Officer that Shri Deol had made a note with regard to the information of offence which he had received, in "Vardhi" book. He had shown that "Vardhi" book to the Investigating Officer. In this case Shri Deol is Investigating Officer. As transpired from the record, the investigation was carried out by Shri Deol and the most important document viz "Vardhi Book" is not tendered in evidence, by him. Inspite of the fact that the documentary evidence, which is available in "Vardhi" book is not produced in this case for reasons best known to the prosecution. It may be noted that the entry made in the said "Vardhi" book with regard to the message received on telephone by Shri Deol is documentary evidence and it was first in point of time. Any how, the

prosecution has withheld that best available evidence of "Vardhi" Book.

[12] As per evidence of P.W.7, Police Inspector, Devising Shivlalsing Deol [complainant], Ex.26, he received a telephone message from D.C.B, South to the effect that Dinesh Dhimatrai Mehta resident of C/23, Sumat Park Apartment, Vadodara was keeping charas in his residential house and that he is carrying on business by selling charas. He also received an information by that very telephonic message from D.C.P., South that at that relevant point of time charas in quantity was there in the house of Dinesh Dhimantrai Mehta. As per his evidence, D.C.P., South directed him [Shri Deol] to make necessary arrangement for carrying out a raid in the house of Dinesh Dhimantrai Mehta. As per his evidence, he sent one Police Constable to call two persons, who can act as panch witnesses, during the course of raid and search. The prosecution has examined P.W.1 - Ilyas Ismail Patel at Ex.8, who was one of the signatories of panchnama Ex.9. As deposed to by Shri Ilyas Ismail Patel in para-11, one Police Head Constable - Jalaluddin Badruddin had come to him and asked him to go with him to J.P. Road Police Station, Vadodara. Another panch Nirmalkumar Shantilal Shah was called at Police Station. Shri Ilyas is one of the signatories of the panchnama Ex.9. The panch witness - Nirmalkumar Shantilal Shah is not examined in this case. As per evidence of Shri Deol, on arrival of two panch witnesses, he informed P.W.3 Police Inspector Shri Bhesania, Police Jamadar Shri Dineshbhai and other Police Head Constable, and Constable about the raid, which was to be carried out at the house of accused - Dinesh Dhimantrai Mehta. A preliminary panchnama was drawn in the police station before leaving the police station for reaching to the house of accused, during the period between 13.45 hours and 14.00 hours on 05/01/1998. As per the evidence of Shri Deol, he in company of two panch witnesses and other police members of the raiding party reached to the house of accused. As deposed to by him in para-2, they reached at the house of the accused at 16.45 hours. (This is quite contrary to second Panchnama which was drawn at house of accused during the period from 15.00 hours to 17.00 hours).

They found that door of that house was closed. Shri Deol knocked at the door of that flat of accused and on knocking that door, door was opened by one person. As per the case of the prosecution, the present accused was that person, who opened the door. As per evidence of Shri Deol, the accused was informed of about the proposed raid and search, which were to be carried out in his

house. For compliance of Section 50 of the NDPS Act, a written information was given to the accused. As per the case of Shri Deol, he informed the accused and asked him as to whether he required his house to be searched in presence of Magistrate or Superior Officer or before him [he being a Police Officer]. It is interesting to note that the accused informed Shri Deol that the house be searched in presence of D.C.P., South. Hence, Shri Deol informed P.W. 8 Shri Samsersinh Miyasinh to come at the residence of accused.

On arrival of Shri Samsersinh Miyasinh at the house of accused, it was raided and searched in presence of panch witnesses and Shri Samsersinh Miyasinh. As per the evidence of Shri Deol, square blocks of opium wrapped in plastic were found. It is the case of the prosecution that two bottles of English wine were also found from the house of the accused along with contraband article of opium [case is for charas]. As that contraband articles were required to be weighed, Shri Deol sent one Police Constable Jalaluddin Badruddin to call Goldsmith with scale and measurement weights. P.W. 2 Pradipbhai Bhagwandas Soni reached at the house of the accused along with scale and measurement weights. He weighed that contraband article, it was found that contraband article was weighting 4 kg. and 940 gram. Thereafter, Shri Deol packed and sealed contraband articles along with two bottles of wine, passport, electric light bill, passbook of S.B.I., one letter received from one Shri L.D.Mehta, U.S.A. and other articles, as per the procedure prescribed in presence of panch witnesses. That all articles were seized under panchnama which was drawn in between 15.00 hours and 17.00 hours, on that very same day. As per the evidence of Shri Deol, he received a certificate Ex.16 from Goldsmith, P.W.2 Pradipbhai Bhagtwandas Soni.

Thereafter, Shri Deol arrested the accused. Then Shri Deol brought all the muddamal articles seized under a panchnama, along with the custody of the accused to J.P. Road Police Station, Vadodra. P.W.6 - Adesinh Himmatsinh, who was incharge of P.S.O. of the Police Station, was present on duty in the Police Station. As per evidence of Shri Deol, he handed over said muddamal articles to Shri Desinh Himmatsinh. Shri Deol lodged his complaint Ex.27 in the Police Station, Vadodara, which came to be registered as C.R.No.II-10/90 at about 18.30 hours and entry with regard to that complaint being lodged by Shri Deol, was made at Sr.No.21 in Station Diary on page-25. That entry No.21 is at Ex.25. As per evidence of P.W.6 Police Jamadar Adesinh Himmatsinh Ex.23

he handed over the muddamal articles produced by Shri Deol to P.W.4, Police Jamadar Fatesinh Bhavansinh Ex.20, who was performing his duty as writer Head Constable, in J.P.Road Police Station, Vadodra. As per the evidence of P.W.4, Police Jamadar Fatesinh Bhavansinh Ex.20, he received muddamal articles at about 18.45 hours on 05/01/1998. As per his evidence on 06/01/1998, he sent P.W.5 Maheshbhai Chaganbhai Prajapati to F.S.L. at Surat. As per evidence of P.W.4 Fatesinh Bhavansing, he entrusted the muddamal articles of the case to P.W.5 Maheshbhai Chhaganbhai Prajapati along with forwarding letter at Ex.28. As per evidence P.W.5, Maheshbhai Chhaganbhai Prajapati, he carried that muddamal articles to F.S.L. on 07/01/1998, which were to be given in F.S.L. He accordingly entrusted that muddamal articles to the responsible officer of F.S.L., who in turn issued a receipt Ex.34. The muddamal article was examined by P.W.9, Bipin Durlabhji, Ex.31, who is Scientific Officer, of F.S.L., Surat and ultimately he gave F.S.L. report Ex.32 along with the report Ex.33 of Biology Division of F.S.L.. On receipt of that report and on completion of investigation of the case, P.I. Shri Deol filed charge sheet against the accused, in Court of Special Judge, Vadodara.

[13] From the evidence, it appears that as per the case of the prosecution, while the residence of accused was raided and searched, two bottles of English wine were also found. That two bottles were recovered under same panchnama. There is a reference of seizure of two bottles of English wine in panchnama in Ex.9. as per an evidence of P.W.3, Pareshbhai Haribhai Bhesania, he lodged a separate complaint for offences punishable under the provisions of the Bombay Prohibition Act and that case was investigated by him. Shri Bhesania had accompanied Shri Deol at the time of raid and search carried out in the house of the accused, in connection with the information received by Shri Deol from Shri Samsersinh Miyasinh with regard to contraband articles under the NDPS Act.

[14] Before we discuss the evidence on record adduced by the prosecution to prove the case against the accused, it will be necessary to place on record certain material facts which cast a doubt for credibility of the case of the prosecution. Herein this case, admittedly, Shri Samsersinh Miyasinh, D.C.P., South, Vadodara, who received a secret information from the informant, instead of taking action under the Act, authorized Shri Deol to make a raid and search in the house of the accused. On the basis of this authorization given by Shri Samsersinh

Miyasinh, Shri Deol first took down that information received from Shri Samsersinh Miyasinh into one telephone "Vardhi" book and immediately, thereafter, he reduced that information into writing by making an Entry No.20 [Ex.24] in the Station Diary of Police Station. It is in evidence on record that, thereafter, he called two persons to act as panch witnesses and by keeping that two persons along with other members of raiding party including Shri Bhesania, he raided and searched the house of the accused. Whatever articles were found from the house of the accused, were seized under panchnama Ex.9 by Shri Deol. Thereafter, Shri Deol lodged a complaint against the accused for an offence punishable under the provisions of the NDPS Act. He himself carried out the investigation of the case and thereafter, he himself filed a charge sheet against the accused in the Court and, therefore, Shri Deol took an active part right from receiving authorization from Shri Samsersinh Miyasinh, upto filing of the charge sheet against the accused. This court has come across a case of Bhagwan Singh Vs. The State of Rajasthan, reported in AIR 1976 S.C. 985, wherein it has been held that if everything is done by the police officer, it would be an infirmity in the case, which is found to be reflected on the credibility of the prosecution case. The principle laid down in the case of Bhagwan Singh Vs. The State of Rajasthan, [Supra] is equally applicable with full force to the facts and circumstances of the present case.

[15] Before making examination and reappreciation of evidence led by prosecution, in the case, it is necessary to note certain facts, which make the case, most doubtful.

[i] From the evidence, it appears that one Stella Michael Christian is an owner of the flat in which, as alleged by the prosecution, accused is residing as tenant for monthly rent of Rs.2,000/- [Rupees Two Thousand Only]. The prosecution has not examined this owner though Stella Michael Christian is cited as witness No.19 in the charge sheet. She is residing in Flat of Gujarat Housing Board, situated Opposite to Police Line, Akota, Vadodara. Her statement was recorded on 09/01/1998. Her evidence is most material to establish the possession of the house with the accused on the date of raid. She is not examined for reasons best known to prosecution.

[ii] As per the case of the prosecution, Shri Deol received authorization from Shri Samsersinh Miyasinh, D.C.P. [South], Vadodara and on the basis of that authorization, he called two persons to act as panch

witnesses and, thereafter, they all left J.P.Road Police Station for residential house of the accused situated in Sumant Park Apartment, Opp. Shrenik Park Society, Vadodara, after drawing a preliminary panchnama in the Police Station. As per the case of the prosecution on reaching the house of the accused, it was found that doors were closed. Shri Deol had knocked the doors and thereupon one person opened that doors and as per the case of the prosecution that person, who opened the doors was nobody else but accused of the case. One of the two persons, who acted as panch witness, was P.W.1, Ilyas Ismail Patel. This Ilyas Ismail Patel has been examined at Ex.8. As per the case of the prosecution this panch witness Ilyas Ismail Patel supported the case of the prosecution. He is not declared as a hostile witness and, therefore, it can be said that the prosecution has placed full reliance on evidence of Ilyas Ismail Patel also. This panch witness Ilyas Ismail Patel has deposed in para-[7] of his evidence that when they proceeded to go to the house of the accused, they had not to make an inquiry about the location of the house on the way. He has deposed that it was true that accused was present in the police vehicle and accused had shown his house. To make it clear with certainty necessary portion of deposition of Ilyas Ismail Patel is reproduced herein below :-

The aforesaid fact gets corroboration from the evidence of P.W.7 Shri Deol himself. Shri Deol has, in para-1 of his deposition, deposed about action which he took after he received a message on telephone from D.C.P., South, Vadodara. As per his evidence he asked one of the Police Jamadar to call two persons who can act as panch witnesses, as a result of which police jamadar brought - [1] Ilyas Ismail Patel and [2] Nirmalkumar Shantilal Shah to the Police Station. As per the complaint, P.S.I. Shri Bhesania, Jamadar Dineshbhai Bhikhabhai, P.H.C. - Mahebubbhai Gulabshah, P.H.C. Harendrasinh Narpatsinh, P.C. Ranvirsing Shobransing, P.C. Vajidali Ajgarali, P.C. Jagdishbhai Mangalbhai, P.C. Jalaludin Badrudin, P.C. Hiteshbhai Bhikhabhia and P.C. Desaibhai Ranchhodbhai were present in the Police Station before he drew a preliminary panchnama, being former part of Ex.9 during the period from 13.45 hours to 14.00 hours on 05/01/1998. As deposed to by Shri Deol

before leaving Police Station, the accused was asked to take search of all the Police members of raiding party in presence of panch witnesses and interse search was made between accused and police members of the raiding party and also between police members of the raiding party and panch witnesses. This fact is deposed to by Shri Deol of a rank of Police Inspector having a gazetted post. This fact itself shows that before leaving the Police Station, the accused was already there in the Police Station and he was taken with Police members of the raiding party along with the panch witnesses, in a vehicle. Thus, say of Ilyas Ismail Patel that accused was with them in Police vehicle when they left Police Station for residence of accused and that accused had shown his house, gets corroboration from evidence of Shri Deol.

[ii] It is the case of the prosecution that after reaching the house of the accused, the doors were knocked by Shri Deol and the accused opened that doors and, thereafter, the accused was given a written information that Police members of the raiding party wanted to raid and search his house. It is the case of the prosecution that before starting to make raid and search, Shri Deol gave a written information Ex.13 to the accused and on reverse of Ex.13, accused put his writing in presence of panch witnesses to the effect that he wanted to have his house searched in presence of any Superior Police Officer. The panch witnesses Ilyas Ismail Patel has deposed in para-8 of his deposition that the accused did not give any writing in his presence stating that he has no objection if, Police raided and searched the house of the accused during the period between 15.00 hours to 17.00 hours. Police Inspector Shri Deol, who is a responsible Police Officer has deposed in para-1 of his deposition that he made an Entry No.20/98 [Ex.24] at 16.05 hours. It is claimed by the prosecution that Entry No.20/98 was made at 14.05 hours. It is quite possible that after receiving a message on telephone from Shri Samsersinh Miyasinh, Entry No.20/98 might have been kept open and blank without any writing about the information. This is quite possible because, Shri Deol has deposed in para-2 of his deposition that he in company of panch witnesses and police members of raiding party reached the house of the accused at 16.45 hours. At this stage, it is stated that complaint of Shri Deol was lodged and registered in Police Station at 18.30 hours on 05/01/1998 though a case has been advanced that complaint was prepared at 17.00 hours.

[iv] As per report at Ex.32, the contraband articles received by F.S.L. were slabs of rectangular shape and

these slabs were 58 in number. P.W.9 - Bipin Durlabhji, who is a Scientific Officer of F.S.L. has deposed in para-7 of his deposition that it was their practice to show the article in pieces, if it is not in powder form or in crumbs from or it is not specific cylindrical shape or oval in shape. He has deposed that in this case whatever muddamal article was received, was slab in rectangular shape and other 57 articles are shown as pieces. P.W.3 P.S.I. Shri Bhesania, who was present, through out the raid and search, has deposed in para-2 that black coloured pieces in cylindrical shape were found from two card board boxes meant for sweets. Panch witness - P.W.1 Ilyas Ismailbhai Patel has deposed in para-13 of his evidence that it was true that the charas was in form of black square pieces and they were packed and sealed in the same condition in which they were found. Thus, as per panch witness the charas, which was found from the house of the accused was packed and sealed in same condition, in which it was found without altering its shape by breaking them. It means that square pieces of charas were not broken before taking them for packing and sealing. It is stated in panchnama Ex.9 that charas slabs in rectangular shape were found and that all pieces were broken and, thereafter, that pieces were packed and sealed. At this stage, it is necessary to note that panch witness Ilyas Ismailbhai Patel has deposed in para-9 of his deposition that panchnama was being dictated by P.S.I. and Police person was writing it and that they [panch witnesses] did not utter any word. Under the circumstances, when panch witness Shri Ilyas has deposed that contraband articles viz charas slabs were found in square shape, while the responsible officer of F.S.L. had received big and small slabs in rectangular shape. P.W.3 P.S.I. Shri Bhesania has deposed in his evidence that a black brown coloured substance in cylindrical shape was found from, two cardboard boxes meant for sweets. Thus, this evidence has created a serious doubt as to what actual substance was found from the house of the accused and in what manner that substance was sent to F.S.L. and what substance was, in fact, received by F.S.L. This is necessary to consider the case on merits because as per the complaint Ex.27, the contraband charas was found from the house of the accused. Police Inspector Shri Deol has deposed in para-2 of his deposition that the opium in shape of square slabs wrapped in plastic were found from two cardboard boxes meant for sweets. He has further deposed that on weighing that opium, it was found that its weight was found to be 4 kg. and 940 grams. The opium is defined under Section XV of Section 2, while charas is defined in Section 2(iii)(a) of the NDPS Act.

Shri Deol is a Police Inspector and he is expected to understand as to what is difference between "charas" and "opium". The complaint is lodged by him for charas. He has given evidence in his deposition that the article, which was found from the house of the accused was opium.

[16] The conduct of P.W.8 - Shri Samsersinh Miyasinh, D.C.P., South, who is a highly responsible Senior Police officer, is required to be considered at the time of appreciating the evidence on record.

[i] P.W.8 - Samsersinh Miyasinh [Ex.13] has deposed that he received a secret information from on informant, when he was performing his duty, in his Office at about 01.00 p.m. on 05/01/1998. P.W.6 - Adesinh Himmatsinh [Ex.23] was performing his duty as P.S.O. in J.P.Road Police Station, Vadoara during the period from 12.00 hours [noon] to 20.00 hours [late evening]. According to him, D.C.P. South gave a "Vardhi" on telephone to Shri Deol at 14.05 hours and, therefore it is necessary to know as to what was done by Shri Samsersinh Miyasinh during the period between 13.00 hours and 14.05 hours. He has deposed in para-4 of his deposition that he did not reduce the information into writing in his office or at any other place. He has further deposed that at 13.30 hours, his one police constable had, in company of informant, gone to the place, which was to be raided and searched. Shri Bhesania [Ex.17] has deposed in para-1 of his deposition that he was present in J.P. Road Police Station on 05/01/1998 and at that time, other police constables were also present in the Police Station. He has further deposed that one constable Shri Ranvirsing Shobransing, who had come from D.C.P., South and his two other colleague police constables were also present in the Police Station. Thus, according to Shri Bhesania, before Shri Deol received an authorization on phone from Shri Samsersinh Miyasinh at 14.05 hours, Police Constable Ranvirsing Shobransing and two other police constables from the office of D.C.P. South had come to J.P. Road Police Station, Vadodara. We do not know as to for what purpose Police Constable Ranvirsingh Shobransing and his two colleague police constables were sent by Shri Samsersinh Miyasinh in company of informant to the place, which was to be raided and searched. We also do not know as to for what purpose that police constables including police constable Ranvirsingh Shobransing were sent to J.P.Road Police Station, before Shri Samsersinh Miyasinh authorized Shri Deol on telephone at 14.05 hours, directing him to go to the place of raid.

[ii] It is interesting to note that on receipt of

message received by Shri Deol on phone from Shri Samsersinh Miyasinh, he called two persons who can act as panch witnesses. After drawing a preliminary panchnama in the Police Station, he in company of said two persons, who were called to act as panch witnesses and other police constables and police head constable and P.S.I. Shri Bhesania, straightway went to the house of the accused. As discussed earlier, P.W.1 - Ilyas Ismail Patel [panch witness] has deposed that along with them, the accused was present in the vehicle. As per evidence of Shri Deol, after reaching the house of the accused, he knocked the doors of the flat of the accused, which was to be searched. It is the say of Shri Deol that the present accused opened that doors and, thereafter, he informed the accused that police wanted to search his house as, there was quantity of charas in his house. Before making search, as per the case of the prosecution, the accused was given a written information [Ex.13] for making compliance of Section 50 of the NDPS Act. If we read Ex.13, we find that the accused was asked as to whether he wanted to get his house searched in presence of Police Inspector [i.e. Shri Deol] or any Gazetted Officer of any other Police Officer. It may be noted that the option was not given to the accused by asking him as to whether he wanted to get his house searched in presence of Magistrate. Any how, compliance of Section 50 NDPS Act is not very much required to be considered because "person" of accused was not to be searched. What was to be searched was the house of the accused and, therefore, it was not necessary to give a written information [Ex.13] to the accused, but when it is given to the accused, it is not necessary to decide as to what type of option was given to the accused. He was asked as to whether he wanted to get his house searched in presence of Police Inspector i.e. Shri Deol or any Gazetted Officer or any other Police Officer. It is the case of prosecution that on reverse of that writing at Ex.13, the accused had put his endorsement and as per that endorsement, he informed Shri Deol that he wanted to get his house searched in presence of any Superior Police Officer. No sane person would opt for Police Officer when he is entitled to opt for either a Magistrate or Gazetted Officer. The accused was not given an option for Magistrate. It is interesting to note that Vadodara City, which is under the control of Police Commissioner many other Police Officers, Superior to P.I. [Shri Deol] could be available in Vadodara. Shri Deol selected Shri Samsersinh Miyasinh, who gave information to him and invited him to come to the residence of accused so that the raid of residential house of an accused can be carried out in presence of a Superior Police Officer as

desired by accused. In endorsement on back of Ex.13, the accused has not stated that he wanted to get his searched in presence of any Superior Police Officer without giving a particular name of such officer. Propriety demands that Shri Samsersinh Miyasinh, who received a secret information from the informant and who directed Shri Deol to go to the residence of accused to carry out the raid and search, should not have opted to go to the residence of the accused. Shri Samsersinh Miyasinh ought to have informed Shri Deol that he might not be called at the time of carrying out raid and search of the house of the accused, because he himself had received secret information from the informant. Herein this case, Shri Samsersinh Miyasinh went to the house of accused and in his presence raid and search were carried out.

[iii] At this stage, it is required to know the evidence relating events, which took place in between 13.00 hours and 14.05 hours. As stated earlier, Shri Samsersinh Miyasinh sent a Police Constable, in company of informant, to place, which was to be raided and searched. As per evidence of Shri Deol, after putting an endorsement on the back of Ex.13, by accused he informed Shri Samsersinh Miyasinh on phone requesting him to come to the house of the accused so that raid and search could be carried out in presence of Superior Police Officer, but before that as per the say of Shri Samsersinh Miyasinh, he had first received a telephone message from the Police Constable, who had gone to see the place, which was to be searched and, thereafter, he received a phone from P.I. of J.P. Road Police Station. Thus, on giving cumulative effect to the aforesaid events, it can well be interfered that Shri Samshersinh Miyasinh was very much interested to see that the raid is carried out successfully at the house of the accused. Once he received a secret information from the informant and once he passed on that information on phone to Shri Deol authorizing him to carry out the raid, it was not necessary for him to send a constable Ranvirsing Shobransing and two other police constables from his office to the place of raid and also to the J.P. Road Police Station. Shri Deol has admitted in his deposition that before leaving Police Station for the house of the accused, Ranvirsing Shobransing and other police constables were with him, while going to the place of raid by the vehicle. So this is a case in which Shri Deol kept three police constables in raiding party, who were sent by Shri Samsersinh Miyasinh well in advance both to the place of raid and also at the Police Station, so that three constables can remain present at the time of raid. Ranvirsing Shobransing first gave information

on phone to Samsersinh Miyasinh and, thereafter, Shri Deol made a phone to Shri Samsersinh Miyasinh requesting him to come to the place of the accused to carry out the raid in his presence. This fact speaks volumes for presence of Shri Samsersinh Miyasinh.

[iv] At this stage, another conduct of P.W.8 Shri Samsersinh Miyasinh is also required to be considered. Shri Samsersinh Miyasinh has deposed in para-8 of his deposition that first he went to the room of the house in which one bag was placed on the shelf and team of raiding party followed him and that bag was taken down from the shelf and was put on the floor of the room and that bag was searched. On reading paras-7, 8 and 9 of deposition of Shri Samsersinh Miyasinh, it clearly appears that, no other premises in house were searched, but Shri Samsersinh Miyasinh had straightway gone to the room in which, the bag was placed on the shelf and, thereafter, that bag was searched. This indicates that without searching any other premises, straightway he went to that room in which the bag was placed on shelf and it was searched. At this stage, it is required to note that at 01.30 hours, he sent police constable Shri Ranvirsing Shobransing to see the place, which was to be raided and searched. This conduct smells some foul activity carried out by Shri Samsersinh Miyasinh through Ranvirsing Shobransing. Otherwise, Shri Samsersinh Miyasinh, who was invited by Shri Deol to remain present at the time of raid cannot have any previous knowledge as to in which part of the premises of the house, the contraband article was concealed This case is filed for contraband article viz. "charas" only. As stated earlier, two bottles of wine were also found from the house of the accused. Shri Bhesania lodged a separate complaint against the accused for that two bottles of Wine and on the basis of that complaint a separate chargesheet for the offences punishable under the provisions of the Bombay Prohibition Act, was filed by him. It is an admitted fact that in this present case that two bottles of English Wine were not produced as muddamal articles along with the chargesheet. When the trial was going on that muddamal two bottles of English Wine were not before the Court as the same were not produced in this case. Inspite of the fact that no muddamal of that two bottles of English Wine were before the Court, Shri Samsersinh Miyasinh had an audacity to depose before the Court that muddamal raxine bag, charas, passport which was in the name of accused, one postal letter received from U.S.A., one passbook, bottles of English Wine were shown to him and they were the same articles. This shows that Shri Samsersinh Miyasinh has deposed in para-2 with some ulterior

interest for two bottles of English Wine. We fail to understand as to why Shri Samsersinh Miyasinh has taken so much interest in the case as discussed hereinabove. This conduct of Shri Samsersinh Miyasinh speaks volumes for a hidden undesired and unknown interest taken by Shri Samsersinh Miyasinh.

[17] P.S.I. Shri P.H.Bhesania [Ex.17] has deposed in para-4 of his evidence that when they started to proceed from the Police Station to carry out the raid, they had with them a warrant. As per Sub-Section (1) of Section 41 of the NDPS Act, either the Magistrate of the First Class of any Magistrate of the second class specially empowered by the State Government can issue a warrant under Sub-Section (1) of Section 41 of the NDPS Act. Section 41(2) of the NDPS Act does not speak anything, about warrant which can be issued by a gazetted officer. Thus, as per say of a responsible Police Officer P.S.I. Shri Bhesania, when they had got warrant with them before they proceeded further, from police station, to go to the house of the accused, then the prosecution ought to have produced that warrant. Prosecution has withheld best available documentary evidence of warrant, as said by Shri Bhesania.

[18] Keeping in mind the aforesaid evidence with regard to events, conduct of Shri Samsersinh Miyasinh and Shri Deol, presence of accused, with raiding party when Shri Deol left Police Station for the house of accused in the vehicle, now we will consider the legal submissions of Shri B.S.Supehia. He has submitted that it is not in dispute that Shri Samsersinh Miyasinh, D.C.P. South, Vadodara had received a secret information from the informant with regard to charas having been concealed in the house of the accused situated at particular address. He received such information at 13.00 hours. As per evidence of Shri Adesinh Himmatsinh, Shri Samsersinh Miyasinh gave that information to P.I. Shri Deol, who was present in J.P. Road Police Station, at 14.05 hours. Mr.B.S.Supehia has argued that as per Sub-Section (2) of Section 41 of the NDPS Act, an empowered gazetted officer is statutorily duty bound to reduce that information which he received, into writing. Herein this case, admittedly, Shri Samsersinh Miyasinh has not reduced that information, into writing anywhere and thus, as argued by Shri B.S.Supehia, Shri Samsersinh Miyasinh has committed a serious breach of mandatory provision of Section 41(2) of the NDPS Act.

[19] Looking to the provisions of the NDPS Act, no person or officer other than, an empowered officer under

Section 41(2) or authorized officer under Section 42(1) of the NDPS Act, can take any action or raid or search any person, building, conveyance or enclosed place. Herein this case, P.W.8 Samsersinh Miyasinh, who was a responsible Superior Police Officer of rank of D.C.P., South, Vadodara had received a secret information from the informant with regard to contraband article namely charas being concealed in the house of accused having his residence in Flat No.C/23, of Sumant Park Apartment, Akota, Vadodara. There cannot be any dispute from the side of prosecution, that Shri Samsersinh Miyasinh was a gazetted officer and, therefore, he was an empowered officer under Section 41(2) of the NDPS Act. In view of Section 41(2) of the NDPS Act, he was statutorily duty bound to reduce that secret information received from the informant into writing, which he has not done. He has clearly stated in para-3 of his deposition that he did not make any note with regard to information, which he received, anywhere. According to him, he informed the Police Inspector of J.P.Road Police Station, Vadodara about the information, which he had received. Mr.B.S. Supehia, learned advocate for the appellant has argued that in view of Section 41(2) of the NDPS Act, Shri Samsersinh Miyasinh totally failed to comply with the requirement of Section 41(2) of the NDPS Act. For our purpose it is necessary to know, Section 41(2) and Section 41(3) to resolve a dispute taken by Mr. B. S. Supehia.

"41. (1) x x x x x x x x x x x x x x x
x x x x x x x x x x x x x x x

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotic substance in respect of which any offence punishable under Chapter IV has been committed or

any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorize any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under subsection (1) is addressed and the officer who authorized the arrest or search or the officer who is so authorized under subsection (2) shall have all the powers of an officer acting under Section 42."

[20] Mr.K.P.Raval, learned APP for the respondent - State has vehemently argued that for Shri Samsersinh Miyasinh, information, was not required to be reduced into writing because he had already conveyed the message with regard to the said secret information on phone to Shri Deol and in turn, Shri Deol had very much reduced that information into writing, which according to him, is an Entry No.20 [Ex.24] on page-24 of the Station Diary. He has further argued that the law does not require that the gazetted officer, who is an empowered officer under Section 41(2) of the NDPS Act, is supposed to reduce the information into writing by himself, personally. According to Mr.Raval, Shri Samsersinh Miyasinh being a superior senior police officer can dictate his subordinate officer to take down that information, which he had received. Mr.Raval has argued that in this case, Shri Samsersinh Miyasinh telephoned Shri Deol, who in turn took down that information in Station Diary. It is an Entry No.20 [Ex.24] in the Station Diary. Alternatively, Mr.K.P.Raval has argued that in this case, Shri Deol was authorized to raid and search the house of the accused and, therefore, at the best, he can be said to be an authorized officer under Section 41(2) of the NDPS Act. He has placed reliance on the latter portion of Section 41(2) of the NDPS Act, which reads as follows :-

"(2) Any such officer of gazetted rank.....,
may authorize any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a

building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place."

If we read Entry No.20 [Ex.24] from the Station Diary on which Mr.K.P.Raval has placed reliance for his submission, we find that it speaks that Shri Samsersinh Miyasinh passed on an information to Shri Deol, on phone at 14.05 hours. That information was with regard to contraband article i.e. charas having been kept by Dinesh Dhimantrai Mehta, residing in Flat No.C/23 of Sumant Park Apartment, Akota, Vadodara and that said person was selling that charas and that on the day of giving information, the charas in quantity was kept by the accused in his house. Immediately, after, passing on such information on phone by Shri Samsersinh Miyasinh, he directed Shri Deol to go to the place and take action in accordance with law. In view of the aforesaid information and direction given on phone by Shri Samsersinh Miyasinh to Shri Deol, Shri Deol called two persons, who can act as panch witnesses and, thereafter, before leaving the police station for the place stated in information, Shri Deol allowed that two persons, who were called to act as panch witnesses to take interse search of the police members of the raiding party headed by Shri Deol and on completion of that formality of interse search a preliminary panchnama was drawn in the Police Station. Thus, according to Shri K.P.Raval, Shri Deol took an action as per the directions given by Shri Samsersinh Miyasinh and, therefore, case of Shri Deol falls under the latter part of Section 41(2) of the NDPS Act, which is reproduced with underline hereinabove and, therefore, when Shri Deol has reduced the information into writing vide Entry No.20 [Ex.24] in Station Diary, the provisions of Section 41(2) of the NDPS Act are very much complied with and in no case, it can be said that Shri Samsersinh Miyasinh has committed a breach of Section 41(2) of the NDPS Act.

[21] As against this, Mr.B.S.Supehia has argued that Shri Deol acted as an authorized officer under Section 42(1) of the NDPS Act. He has argued that Shri Deol was an officer under the category of "Any such officer" whose reference is found in opening part of Section 42(1) of the NDPS Act. Mr.Supehia has further argued that when case of Shri Deol falls under Section 42(1) of the NDPS Act, there cannot be any dispute with regard to absence of compliance of subsection (2) of Section 42 of the N.D.P. S. Act. To understand the arguments of Mr.Supehia, it would be advantageous to reproduce Section

42 of the NDPS Act. Section 42 reads as follows :-

"42. Power of entry, search, seizure and arrest without warrant or authorization - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central government or of the Border Security Force as is empowered in this behalf by general or special order by the Central government, or any such officer (being an officer superior in rank to a peon, seppoy or constable) of the revenue, drugs control, excise, police or any other department of a State government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset, after recording the grounds of his belief

[2] Where an officer takes down any information in writing under sub-section (1) or records grounds for his behalf under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

[22] Mr.B.S.Supehia, learned advocate for the appellant has argued that in no case, Shri Deol can be said to be an empowered officer under Section 41(2) of the NDPS Act. Looking to the facts and circumstances of the case and what Shri Samsersinh Miyasinh has deposed before the trial court, Shri Samsersinh Miyasinh had received a secret information from the informant and he, by way of conveying that information on phone to Shri Deol, authorized Shri Deol to raid and search the house of the accused and, therefore, the case of prosecution so far as it relates to Shri Deol, falls under Section 42(1) of the NDPS ACT Act. Mr.Supehia has argued that looking to the words "information given by any person and taken down in writing" used in Section 42 (1) of the N.D.P.S."

Act clearly suggest that Shri Deol was an authorized officer under Section 42(1) of the NDPS Act. Shri Supehia has no dispute with regard to information having been reduced into writing by Shri Deol by making Entry No.20 [Ex.24] in Station Diary. His main contention is with regard to noncompliance of latter part of Section 42(2) of the Act. He has argued that Shri Samsersinh Miyasinh was not an immediate superior officer of Shri Deol. He has put much stress on the words "his immediate officer superior" used latter portion of sub-section (2) of Section 42 of the NDPS Act. As per his arguments, after reducing an information received by authorized officer under Section 42 (1) of the NDPS Act into writing, for authorized officer he was statutorily duty bound to send forthwith a copy of such information, which he reduced into writing, to his immediate official superior. It is in evidence of Shri Deol at para-11 that his immediate superior officer was Shri B.R. Simpy, A.C.P. P.W.6, Shri Adesinh Himmatsinh, P.S.O. of J.P. Road Police Station has deposed in his evidence that Shri Thakor, S.P. was immediate superior officer of Police Officer of his Police Station. So from the evidence, two types of the case come forward with regard to immediate superior officer of Shri Deol. According to Shri Deol, Shri B.R.Simpy, A.C.P. was his immediate superior officer, while according to Shri Adesinh Himmatsinh, Shri Thakor, S.P. was an immediate superior officer of Shri Deol. Admittedly, Shri Samsersinh Miyasinh, D.C.P., South was not an immediate superior officer of Shri Deol. Mr.B.S.Supehia has argued that as per the latter part of Sub-Section (2) of Section 42 of the Act, Shri Deol was expected to send forthwith a copy of Entry No.20 [Ex.24] to his immediate superior officer Shri B.R.Simpy, A.C.P. Here in this case, Shri Deol has admitted in para-14 of his evidence that it was correct to say that if any information under the provisions of NDPS Act is reduced into writing, a copy thereof was required to be sent to immediate superior officer. He has admitted in this case, that he has not sent a copy of Entry No.20 [Ex.24] to his immediate superior officer. For this noncompliance of latter part of Section 42(2) of the NDPS Act, Shri Deol has tried to explain in para-14 of his evidence that he had orally informed Shri B.R.Simpy, when Shri Simpy had come personally in the Police Station, after occurrence of the incident. He was cross-examined on this alleged compliance of letter part of Section 42(2) of the NDPS Act. In his cross-examination, Shri Deol has admitted that there is no note in his case diary to show that he had informed Shri Simpy personally, when Shri Simpy had come to Police Station after occurrence of the incident. He has also admitted in his evidence that

there is no note in his case diary to show that within 48 hours from time of occurrence of incident, he had made a written report to Shri B.R.Simpy, who was his immediate superior officer. Herein this case, the prosecution has not examined Shri B.R.Simpy, A.C.P., who was immediate superior officer of Shri Deol, to substantiate the say of Shri Deol that he had informed Shri Simpy about the raid and search immediately after arrival of Shri Simpy in Police Station after occurrence of incident. By showing this evidence, Mr.B.S.Supehia has argued that Shri Deol, who was authorized officer under Section 42(1) of the NDPS Act has not complied with the mandatory requirement contained in latter part of Sub-Section (2) of Section 42 of the Act. As against this, Mr.K.P.Raval, learned APP for the respondent State has argued that in no case, it can be said that Shri Deol was an authorized officer under Section 42(1) of the NDPS Act. According to him, as per evidence, Shri Deol was an authorized officer, as per latter part of Section 41(2) of the NDPS Act and, therefore, it was not necessary for him to send a copy of information to immediate superior officer forthwith and, therefore, in no case, it can be said that Shri Deol has committed a breach of latter part of Section 42(2) of the NDPS Act by not sending a copy of Entry No.20 [Ex.24] of the Station Diary, forthwith to Shri B. R. Simpy, A.C.P., who was his immediate superior officer.

[23] Looking to the aforesaid submissions, it is required to know as to what is the settled legal position with regard to Sections 41 and 42 of the NDPS Act. Mr.B.S.Supehia has placed reliance on the case of State of Punjab Vs. Blabir Singh, reported in J.T. 1994 (2) S.C. 108. In para-15 [page-120], it has been laid down by the by Hon'ble Supreme Court as follows :-

> "However, if such information is given by any person, the same should be taken in writing as provided both under Sections 41(2) and 42(1)".

So as per interpretation of Sections 41 and 42 of the NDPS Act, now the Hon'ble Court Supreme Court has made it clear that for both types of officers; empowered gazetted officer under Section 41(2) or authorized officer above the rank of constable, under Section 42(1), they are required to reduce the information into writing. Herein this case, P.W. 8, Samsersinh Miyasinh, who in first in point of time received secret information did not reduce the information received by him, into writing

and, therefore, this is a clear cut case of contravention of Section 41(2) of the NDPS Act on the part of Shri Samsersinh Miyasinh.

Mr.K.P.Raval has, with the help of facts of the case, argued that whatever the information was received by Shri Samsersinh Miyasinh, was immediately conveyed by him to Shri Deol by giving message on telephone and in turn Shri Deol reduced that information into writing by making an Entry No.20 [Ex.24] on page-24 of the Station Diary and, therefore, in no case, it can be said that Shri Samsersinh Miyasinh has committed a breach of Section 41(2) of the NDPS Act. At this stage, the facts are required to be examined to consider the submissions of both the parties on the point of compliance of Section 41(2) of the NDPS Act. P.W.8 - Samsersinh Miyasinh has deposed that he received a secret information from the informant at 13.00 hours, when he was present in his office i.e. Office of D.P.C., South Vadodra. It may be noted that immediately after 13.00 hours, he did not pass on that information to Shri Deol on phone. As per evidence of P.W.6 Adesinh Shobransing, who was present as P.S.O. in J.P. Road Police Station, Vadodara, during the period between 12.00 hours and 20.00 hours, on 05/01/1998, has categorically deposed that D.C.P., South had given a "Vardhi" to P.I. Shri Deol on telephone and that "Vardhi" was received by Shri Deol at 14.05 hours. This say of Shri Adesinh Himmatsinh is corroborated by a documentary evidence of Entry No.20 [Ex.24] of Station Diary. So from the evidence of Shri Adesinh Himmatsinh read with Entry No.20 [Ex.24], it clearly appears that Shri Samsersinh Miyasinh sat silent for about one our and five minutes. He kept information, which he received at 13.00 hours, in his memory upto 14.05 hours, without making any kind of note, anywhere. When he came to the trial Court to give evidence, he deposed with regard to information, which he had received at 13.00 hours. He received an information on 05/01/1998, while he gave his evidence before the trial Court, On 05/08/1998 i.e. after seven months. As he did not make any note anywhere with regard to information, which he had received, naturally, he gave his evidence by refreshing his memory on bare reading of Entry No.20 {Ex.24} from the Station Diary. What the information, he had received at 13.00 hours on 05/01/1998 is one thing and what he conveyed on phone to Shri Deol at 14.05 hours is a different thing. During the period of one hour and five minutes, possibility of an error having been committed by Shri Samsersinh Miyasinh in giving message on phone to Shri Deol cannot be ruled out because what he had received a secret information at 13.00 hours was not actually

conveyed forthwith to Shri Deol on phone. For the reasons best known to Shri Samsersinh Miyasinh, he allowed to elapse a time of one hour for informing Shri Deol on phone. Within this one hour, he might have forgotten some part or parts of the information or he might have added something more under his faint impression. Mr.B.S.Supehia has argued that this is not the requirement of Section 41(2) of the NDPS Act, but legislature intended that an empowered gazetted officer must immediately take down the information into writing, which he may receive with regard to offence committed by offender under the NPDS Act. Mr.B.S.Bupehia has placed reliance on case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, reported in AIR 2000 S.C. 821. This cited case of AIR 2000 S.C. 821 is arising from a case of State of Gujarat Vs. Abdul Rrashid Ibrahim Mansuri, reported in 1990 (2), 31(2) GLR 947. This Court in the case of State of Gujarat Vs. Abdul Rashid Ibrahim Mansuri, reported in 1990 (2), 31(2) GLR 947, had held that Police Inspector Shri P. M. Vishen was an empowered officer under Section 41(2) of the NDPS Act [relevant portion of para-25 on page 964].

In that case, the learned Judge of the trial court had acquitted the accused of offences under NDPS Act. This Court convicted the accused of that case by reversing a finding of acquittal into conviction. Accused of that case moved the Hon'ble Supreme Court of India by preferring Criminal appeal No.78 of 1992 and while deciding that Criminal Appeal No.78 of 1992, the Hon'ble Supreme Court set aside the judgment of conviction rendered by this Court and restored the judgment of acquittal rendered by the learned Judge of the trial Court. The judgment rendered by the Hon'ble Supreme Court in Criminal Appeal No.78 of 1992 is reported in AIR 2000 S.C. 821 and in this cited case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, reported in AIR 2000 S.C. 821, it has been held by Hon'ble Supreme Court as follows.

"18-19. Learned counsel for the State of Gujarat thereupon contended that as the appellant did not dispute the factum of recovery of the "Charas" from the vehicle it does not matter that the information was not recorded at the first instance by the police officer. We cannot approve the contention because non-recording of information has in fact deprived the appellant as well as the Court of the material to ascertain

what was the precise information which PW-2 got before proceeding to stop the vehicle. Value of such an information, which was the earliest in point of time, for ascertaining the extent of the involvement of the appellant in the offence, was of a high degree. A criminal Court cannot normally afford to be ignorant of such a valuable information. It is not enough that PW-2 was able to recollect from memory, when he was examined in Court after the lapse of a long time, as to what information he got before he proceeded to the scene."

In the aforesaid cited case in para-13, the Hon'ble Supreme Court has observed as follows :-

"For the purposes of this case, PW-2 being a police officer much above the rank of a constable, would be "any such officer" as envisaged in the Section [i.e. Section 42 of the NDPS Act]."

[24] Mr.B.S.Supehia, learned advocate for the appellant has cited an authority of State of Orrisa Vs. Laxman Jena, reported in J.T. 2002 (5) S.C. 1, wherein, it has been held in para-5 and 6 as follows :-

"5. There is no dispute that section 42 has two parts. The first part deals with the recording of the information and the second with the conduct of the search. Again first part of the section has two limbs, first dealing with the recording of the information received and the other relating to the belief of the officer based upon his personal knowledge. Any information recorded in terms of subsection (1) of section 42 is required to be sent to the superior officer of the person recording the information as mandated by subsection (2) of section 42. Second part of the section 42(1) deals with the power of the officer regarding entry, search, seizure and arrest without warrant of authorization. The authorized officer has the power to enter into and search any building, conveyance or place and in case of resistance, break open any door and remove any obstacle to such entry. He has power to seize the drug or substance and all materials used in the manufacture thereof and any other

article and any animal or conveyance which he has reason to believe to be liable to confiscation under the Act to detain and search, if he thinks proper, and arrest any person whom he has reason to believe to have committed any offence punishable under chapter IV relating to such drug or substance.

6. However, in exercising a power under the second part of section 42(1) the designated officer is under a legal obligation to comply with the mandate of the proviso to subsection (1) providing for recording of grounds of his belief to make the search in terms of the powers conferred upon him. In the instance case the High Court has found on facts that before making the search, the officer concerned had not recorded reasons or grounds for his belief to make the search in terms of proviso to section 42(1) of the Act."

[25] As seen in the case of Abdul Rashid Ibrahim Mansuri Vs.State of Gujarat, [Supra], the Hon'ble Supreme Court has categorically held that PW-2 of that case being a police officer [police inspector] much above the rank of a constable, would be "any such officer" as envisaged in section 42. Thus, P.I. Shri Deol, though he was a gazetted officer, was "any such officer" as envisaged in Section 42(1) of the NDPS Act. In view of this, once a case with regard to Shri Deol, falls under Section 42(1) of the NDPS Act, he was excepted to send forthwith a copy of Entry No.20 [Ex.24] to his immediate superior officer Shri Simpy, A.C.P. Admittedly, Shri Deol has not sent a copy of Entry No.20 [Ex.24] of the Station Diary to Shri B.R.Simpy. His excuse for not sending a copy of Entry No.20 [Ex.24] to Shri B.R. Simpy cannot be accepted. He has explained for such noncompliance by saying that Shri B.R. Simpy had come to Police Station, after incident and he informed Shri B.R.Simpy orally personally.

[25.1] In view of the aforesaid case of Abdul Rashid Ibrahim Mansuri Vs.State of Gujarat,[Supra], where "Police Officer had reason to believe from information given by any person that narcotic drugs was kept or concealed in any building, conveyance or enclosed place, the requirements to be complied with as envisages by Sec.42 by him before he proceeded to search any such building or conveyance or enclosed place were towfold. First is that he should have taken down the information in writing. Second is that he should have sent forthwith a copy thereof to his immediate official superior.

In view of this, orally informing Shri B.R.Simpy by Shri Deol about the Entry No.20 [Ex.24], after occurrence of incident, will not satisfy the latter part of subsection (2) of section 42 of the NDPS Act.

When an obligatory duty is cast by the statute, as Sec.42(2) of the NDPS Act casts on the officer receiving information to inform his immediate superior officer, the question whether prejudice is caused or not to the accused on account of the nonperformance of that duty is immaterial. What the Court has to examine is whether the mandatory obligation has been strictly carried out by the authority enjoined in law to carry out. The mandatory requirement under Section 42(2) was to send a copy of the information i.e. Ex.24 to Shri B.R.Simpy. This requirement is not fulfilled. The question whether prejudice was caused or not is entirely extraneous to Section 42(2) of the NDPS Act.

In case of State of Punjab Vs. Balbir Singh, reported in J.T. 1994 (2) S.C. 108,it has been held in para-27 that only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. It has further been held that under Section 42(1), the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. It has further been held that under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total noncompliance of this provision the same affects the prosecution case. To that extent it is mandatory. In the case of W.H. King Vs. Republic of India, reported in AIR 1952 S.C. 156, wherein the Apex Court has laid down a principle in it judgment as follows:

"As the statute creates an offence and imposes a penalty of fine, and imprisonment the words of section be strictly construed in favour of the subject. We are not concerned so much with what might, possibly have been intended as with what has been actually said in any by the language employed."

In view of above legal position, when a duty is cast on the empowered officer under Section 41(2) of the

NDPS Act to immediately take down the information, which he received. Shri Samsersinh Miyasinh, D.C.P., South has committed a breach of Section 41(2) of the NDPS Act, by not reducing into writing a secret information, which he received from informant at 13.00 hours. Not only that he failed to reduce that secret information into writing, but he allowed a period of 1.00 hour to pass and at about 14.05 hours, he, from his memory, informed Shri Deol about the said information which he received at 13.00 hours and Shri Deol in turn reduced that message, which he received from Shri Samsersinh Miyasinh into writing by making an Entry No.20 [Ex.24] in the Station Diary. Thus, there is noncompliance of Section 41(2) of the NDPS Act on the part of P.W.8 Shri Samsersinh Miyasinh, D.C.P. South.

[26] In view of the discussion made hereinabove, though Shri Deol being "any such officer" as envisaged in sub-section (1) of section 42 of the NDPS Act had reduced information received from Shri Samsersinh Miyasinh into writing by making an Entry No.20 [Ex.24] in the Station Diary, he totally failed to comply with the provisions of latter part of sub-section (2) of section 42 of the NDPS Act, by not sending forthwith a copy of Ex.24 to Shri Simpy, A.C.P. In view of what is discussed hereinabove, there is noncompliance of Section 42 of the NDPS Act on the part of P.W.7 Shri Deol who was I.O. and officer filing the charge sheet.

[27] A faint attempt has been made by Shri K.P.Raval by citing an authority of Dhanpal Singh Barun Singh Thakur & Ors. Vs. State of Gujarat, reported in 1996 (1), 37(1) GLR 219, wherein a Police Inspector, who carried out the raid and search was treated as an empowered officer under Section 41(2) of the NDPS Act. In view of the latest decision of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, [Supra], now it is crystal clear that a Police Inspector was considered by the Hon'ble Supreme court as "any such officer" envisaged under Section 42(1) of the Act and, therefore, this authority will not render any assistance to the respondent - State.

He has also cited another case of State of Gujarat Vs. Abdul Rashid Ibrahim Mansuri, reported in 1990(2), 31(2) GLR 947. Now this authority is of no value because, it has been overruled by the Hon'ble Supreme Court in the very case between the very same parties, reported in AIR 2000 S.C. 821 and, therefore, now this second authority cannot be looked into.

Mr.K.P.Raval has cited third authority of Kamlesh Parmanand Gangwar Vs. State of Gujarat, reported in 1999 (3) 40(3) GLR, 2119. In this cited case, the entire procedure was conducted in the presence of Superintendent of Police and P.S.I. has admitted in his deposition during cross-examination that he had not informed his superior officer in writing. The Division Bench of this Court, after considering Section 41(2) of the NDPS Act has held that it would be quite clear that requirement of Section 42(2) would be necessary to be met with only where, the officer making the entry, search, seizure or arrest is an officer falling under the category of Sec.41(2) of the NDPS Act carries out such entry, search, seizure or arrest, and in that case requirement of Sec.42(2) would not be necessary to be met with. In that case, the Superintendent of Police had remained present though out during the course of raid and search. Mr.K.P. Raval, learned APP has argued that in this case, Shri Samsersinh Miyasinh, D.C.P. South had remained present throughout with Shri Deol during the course of raid and search and, therefore, Shri Deol, who being a gazetted officer under Section 41(2) of the NDPS Act was not required to send a copy of Entry No.20 [Ex.24] to his immediate superior officer. At this stage, it is recalled that Shri Samsersinh Miyasinh did not act as a superior officer by remaining present along with Shri Deol during the course of raid and search of the house of the accused. Herein this case, as per the case of Shri Deol, in compliance of Section 50 of the NDPS Act, he informed and asked the accused, as to whether he wanted his house to be searched in presence of P.I. [i.e. Shri Deol] or gazetted officer or any superior officer and in reply to that question, as per the case of Shri Deol, the accused informed Shri Deol that he wanted his house to be searched in presence of Shri Samsersinh Miyasinh, D.C.P. South and in compliance of that Section 50 of the NDPS Act, Shri Samsersinh Miyasinh was invited at the instance of accused and as a neutral superior officer, he remained present along with Shri Deol during the course of raid. We have discussed earlier about the propriety of Shri Samsersinh Miyasinh for his presence at the time of raid and search of the house of the accused, particularly when he himself had received a secret information from the informant. Looking to the written information at Ex.13 for making compliance of Section 50 of the NDPS Act, the accused was not asked to exercise option for Magistrate. As per Ex.13, the accused was asked as to whether he wanted his house to be searched in presence of P.I. Shri Deol or gazetted officer or any police officer. To our mind no sane accused would prefer to ask the raiding officer to keep the superior police officer, who had

received a secret information of that very case from the informant. Any how, when there is an evidence on record in the deposition of Shri Deol that the accused wanted the house to be searched in presence of Shri Samsersinh Miyasinh, D.C.P., South, the presence of Shri Samsersinh Miyasinh will not be equated with the presence of a superior police officer along with raiding officer during the search as indicated in the case of Kamlesh Parmanand Gangwar Vs. State of Gujarat, [Supra] cited by Mr.K.P.Raval. In view of this, this third authority also does not render any assistance to the respondent - State.

[28] Mr.K.P.Raval cited one more authority of State of Orrisa Vs. S. Mohanty and Others, reported in (2000) 2 S.C.C. 170. In that cited case, Executive Magistrate, Deputy Superintendent of Excise, Sub-Inspector of Excise and other subordinate staff, while on patrolling duty, received information that the accused was keeping charas in his house and that he was dealing in such narcotic substances and on receiving of such information, the Deputy Superintendent of Excise authorized his Sub-Inspector to reach the accused's house and the Deputy Superintendent of Excise himself accompanied them and got the raid and search and seizure accomplished under his own instructions and supervision. The question arose as to whether the case falls under Section 41 or 42 of the NDPS Act. The Hon'ble Supreme court has held that the case was falling under Section 41 and not under Section 42 of the NDPS Act. There cannot be any dispute for the principle laid down in the cited case. The facts and circumstances of that case are totally different to that of this present case because herein this case, Shri Samsersinh Miyasinh authorized Shri Deol to carry out the raid at the house of the accused and subsequently, for making compliance of Section 50 of the NDPS Act that very Police Officer Shri Samsersinh Miyasinh was invited by Shri Deol at the time of carrying out the raid, at the house of the accused and Shri Deol raided in presence of Shri Samsersinh Miyasinh. This authority is not applicable to this case, in view of the resent judgment of State of Orrisa Vs. Laxman Jena [Supra].

[29] Thus in this case, there is total noncompliance of Section 41(2) of the NDPS Act, on the part of Shri Samsersinh Miyasinh and noncompliance of Sub-Section (2) of Section 42 of the NDPS Act on the part of Shri Deol. In view of this, the judgment of conviction, which is challenged in this appeal is not correct according to law as the same is rendered by the learned Judge of the trial Court without keeping in mind the statutory requirement

of Sections 41 and 42 of the NDPS Act read with principles laid down by the Hon'ble Supreme Court, which we have dealt with hereinabove.

[30] Mr.B.S.Supehia has argued that in this case, there is also noncompliance of Section 57 of the NDPS Act. Section 57 of the NDPS Act reads as follows :-

"57. Report of arrest and seizure - Whenever any person makes any arrest of seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to him immediate official superior."

Admittedly, herein in this case, Shri Deol has not made any detailed report with regard to raid and search carried out in the house of the accused. From the record, it appears that Shri Deol has not complied with the provisions of Section 57 of the NDPS Act by sending full report to his immediate superior officer Shri Simpy. As held in para-27 of State of Punjab Vs. Balbir Singh [Supra], the provisions of Sections 52 and 57, which deal with the steps of taking a seizure under Sections 41 and 42, are not mandatory. If there is noncompliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been cased to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as merits of the case. Mr.Supehia is unable to satisfy this Court as to how and in what manner the accused has been prejudiced, as a result of noncompliance of Section 57 of the NDPS Act and, therefore, on this count with regard to noncompliance of Section 57 of the NDPS Act, the accused cannot get any benefit.

[31] In view of what is discussed hereinabove, herein this case, looking to the facts and circumstances of the case, Shri Samsersinh Miyasinh, D.C.P. has taken some hidden interest on the basis of following facts.

[a] He sent a Police constable - Shri Ranvirsing of his office and informant well in advance at 13.30 hours to the house of the accused much before informing Shri Deol on phone.

[b] Before Shri Deol informed on phone to come to residence of accused, Shri Ranvirsing of his office had informed Shri Samsersinh Miyasinh on phone. In absence

of evidence of Shri Ranvirsing of his office, there is nothing on record to indicate as to what message was given by Shri Ranvirsing on phone, to Shri Samsesinh Miyasinh.

[c] After reaching the house of accused, Shri Samsersinh Miyasinh, straightway went to that room in which the contraband article was kept in one bag, which was found placed on shelf and from that bag, the contraband article was found. Thus, this conduct of Shri Samsersinh Miyasinh devoid of propriety on his part raises a doubt.

We are unable to understand as to what was the intention of Shri Samsersinh Miyasinh in this case looking to his conduct and that creates a doubt and this creation of doubt entitles the accused to have a benefit of doubt. Moreover, there is noncompliance of Section 41(2) of the NDPS Act on the part of Shri Samsersinh Miyasinh and noncompliance of Section 42(2) of the NDPS Act on the part of Shri Deol and mandatory provisions of these two sections are proved to have been breached by the Police Officers in this case.

In view of this matter, conviction cannot be sustained and therefore, this appeal deserves to be allowed. The judgment Ex.48 rendered by learned Special Judge, Vadodara in N.D.P.S. Case No.3 of 1998 on 30/12/2000 is quashed and set aside. The appellant be set free forthwith if he is not required in custody for any other case. The muddamal articles be disposed of as per the directions given, in para-3 of operative part of judgment, by the learned Special Judge, Vadodara.

[D. K. TRIVEDI, J.]

[H. H. MEHTA, J.]

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